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No. 99-898

In the Supreme Court of the United States

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

DONNA E. SHALALA, *et al.*,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This *amici curiae* brief is submitted in support of the Petitioners, City of Chicago and its officials. By letters filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief in its entirety was drafted by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, or their counsel.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The United States Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. There are about 1,100 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor. In addition, associate membership is offered to mayors of cities with populations under 30,000. The work of the Conference is guided by several Standing Committees and task forces, and every mayor in the Conference participates directly in the debate and selection of current policy positions.

Founded in 1935, the National Association of Counties ("NACo") is the only national organization in the country that represents county governments. NACo's membership totals over 1,800 counties, representing over 75 percent of the nation's population. With headquarters on Capitol Hill, NACo's primary mission is to ensure that the county government message is heard and understood by all levels and branches of the federal government.

The National League of Cities ("NLC") is the country's largest and most representative organization serving municipal governments. Founded in 1924 as the American Municipal Association by ten State municipal leagues, today its direct members include 49 State municipal leagues and more than 1,500 communities of all sizes. Through the membership of the State municipal leagues, NLC represents more than 18,000 municipalities. Although most of the nation's larger municipalities are members of the league, more than 75 percent of NLC's direct members have populations less than 50,000, and small cities, towns and villages play an equal and key part in the activities of the organization.

The International City/County Management Association ("ICMA") is a professional and educational organization

representing appointed managers and administrators in local governments throughout the world. Its purposes are to enhance the quality of local government and to support and assist professional local administrators in the United States and other countries. From its foundation in 1914, ICMA has had a commitment to the preservation of the values and integrity of representative local government and local democracy and a dedication to the promotion of efficient and effective management of public services.

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization that has been an advocate and resource for local government attorneys since 1935. Owned solely by its members, IMLA supports the development of fair and realistic legal solutions and provides its members with information about, and solutions to, the profusion of legal issues facing its membership today. IMLA serves as a clearinghouse of local law information for its more than 1,400 members. It collects from and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws.

The *amici* represent the interests of local governments, which bear the brunt of the federal legislation at issue in this case. The *amici* have no power or control over decisions to admit, exclude, or deport immigrants. The federal government has exclusive power over these decisions. By shifting the obligation to maintain and support legal aliens who have become indigent to the States, the federal government has placed what amounts to an unfunded mandate on local governments. Locals governments receive no assistance from the federal government in absorbing the costs of care for this vulnerable population. The *amici* have a strong interest in determining the proper limits on the federal government's power to discriminate against noncitizens, and

therefore the *amici* urge the Court to take this case so as to clarify those limits.

SUMMARY OF ARGUMENT

The court below held that while equal protection requires States not to discriminate against aliens, it allows the federal government to discriminate against noncitizens if the discrimination has merely a rational basis in the federal government's desire to save money. The court held that because the federal government enjoys sole authority over the decision to admit or exclude an alien and the terms on which the alien is admitted, the Congress also has the power to discriminate against aliens and in favor of citizens in its disbursal of federal benefits. This case offers the Court the opportunity to make it clear that there is but a single equal protection that applies to the States and to the federal government alike.

The ruling of the court below is not supported by the decisions of this Court and, if it remains untested, will effect a fundamental shift of the responsibility for caring for aliens from the federal government to the States. The Welfare Reform Act generally moves to put welfare policy in the hands of States. When it dumps responsibility for the care of indigent noncitizens onto state and local governments, it effects what amounts to an unfunded mandate. The Act by definition limits the benefits only of those noncitizens who are unable to care for themselves, and thus leaves States and local governments only the Hobson's choice of relieving poverty at once or dealing with its effects over time.

Although it contains broad language that is easily misinterpreted, *Mathews v. Diaz*, 426 U.S. 67 (1976), does not establish that all federal legislation affecting noncitizens is

subject only to rationality review. The Court should grant certiorari in this case to make clear an important basis of the decision in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976): that *Diaz* had left undecided the limits of Congress's actions towards noncitizens. These limits remained unclear because neither case decided how much of federal legislation that affects noncitizens is undertaken pursuant to Congress's immigration power. The Court should hear this case in order to demonstrate that the immigration power extends to measures regulating directly to whether noncitizens may enter or remain in the country and to the terms of naturalization, but no further.

The Court should grant certiorari and hear argument in this case in order to establish the precise limits of Congress's freedom to discriminate against noncitizens admitted to the United States under Congress's laws and its ability to impose the burdens of that obligation on state and local governments.

ARGUMENT

I. THE RULING BELOW WOULD EFFECT A FUNDAMENTAL CHANGE IN FEDERAL-STATE RELATIONS

By holding that there are two equal protection standards for aliens, one applicable to the States and a second less restrictive one applicable to the federal government, the court below created a constitutional structure that fails to treat State and local governments "in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999). As this Court has recognized, "the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 2264. Those scarce

resources include welfare benefits paid for from the taxes of city and state residents. The Equal Protection Clause, as interpreted by this Court, requires State and local governments to allow discrete and insular minorities such as aliens, who cannot use the political process to help themselves, to share in the allocation of scarce resources without distinction. *See Graham v. Richardson*, 403 U.S. 365, 374 (1971); *cf. Hampton v. Mow Sun Wong*, 426 U.S. at 102-03 (the rule against employment of noncitizens in the civil service "has its impact on an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community. Aliens are not entitled to vote and . . . are often handicapped by a lack of familiarity with our language and customs. . . . By reason of the Fifth Amendment, such a deprivation must be accompanied by due process."). Those same disqualifications which prevent aliens from protecting themselves in the political process at the state and local levels and which justify the application of strict scrutiny to state and local legislation that discriminates against aliens, however, also prevent aliens from protecting themselves in the federal political process. This minority is just as discrete, just as insular, and at least as powerless when facing the full force of the federal government. Nor does the federal government's interest in saving welfare funds differ qualitatively from that which in the State "'cannot justify an otherwise invidious classification,'" *Graham*, 403 U.S. at 375 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

Holding the federal government to a different equal protection standard than the States violates basic principles of federalism:

> The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion

> of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . . Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government."'"

Alden, 119 S. Ct. at 2247 (quoting *Printz v. United States*, 521 U.S. 898, 919-20 (1997) (quoting The Federalist No. 15, at 109)); *accord New York v. United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States"). Thus, "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 119 S. Ct. at 2263.[2]

By holding that Congress may discriminate against legal aliens and in favor of citizens to save money, the court below effectively gave Congress the power to impose an unfunded mandate, shifting the onus to make the unpopular political

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[2] *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.").

decisions to provide benefits for this vulnerable population from the federal government to the States and local governments. *See id.* at 2264 (expressing concern with congressional statute that would threaten financial integrity of the States and "giv[e] Congress a power and a leverage over the States that is not contemplated by our constitutional design").

The Welfare Reform Act (the "Act"), and later legislation amending it, directly and impermissibly discriminates against noncitizens in the provision of welfare benefits. Subject to certain limited exceptions, the Act makes noncitizen legal permanent residents who enter the country after August 22, 1996 ineligible for benefits from the Supplemental Security Income Program, 42 U.S.C. §§ 1381 *et seq.* ("SSI"), or the Food Stamp Program, 7 U.S.C. §§ 2011 *et seq.*[3] Those who entered before that time but were not receiving benefits on that date may receive SSI benefits only if they become blind or disabled, Pub. L. No. 105-33, § 5301, 111 Stat. 251, 297 (1997), and may receive Food Stamps only if they are disabled, elderly or children, Pub. L. No. 105-185, §§ 504, 506, 507, 112 Stat. 578-79 (1998). Legal resident immigrants, again subject to certain limited exceptions, cannot receive "[f]ederal means-tested public benefits" for five years after they enter the country. *See* 8 U.S.C. § 1613. Such benefits include Temporary Assistance for Needy Families, 42 U.S.C. §§ 601 *et seq.* ("TANF"), and Medicaid benefits, 42 U.S.C. §§ 1396 *et seq.* *See* Cert. Pet. at 3 n.2. Persons who are United States citizens are not subject to the same limitations.

These limitations shift the burden of caring for indigent noncitizens to local governments, creating an unfunded

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[3] *See* Welfare Reform Act, Pub. L. No. 104-193 §§ 402-03, 110 Stat. 2105, 2113-24 (1996).

mandate, in two ways. First, for those state and local governments that already had some safety net benefit programs in place before the passage of the Act, it greatly increases the burden on those programs. Many state and local governments have programs that provide cash or health benefits to residents. *See* Wendy Zimmerman & Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants under Welfare Reform* 3-4 (Urb. Inst. 1999) ("Zimmerman"). Under *Graham v. Richardson*, 403 U.S. 365 (1971), these governments are required to grant these benefits on an even-handed basis to citizens and legal aliens alike. Because the Act severely limits the federal assistance for which noncitizens can qualify, it necessarily increases the number of noncitizens—against whom local governments are prohibited from discriminating—who qualify for such programs and to whom these governments will be forced to grant benefits under these programs. *See* Zimmerman at 31-38.

The facts of this case provide an example of that burden. As alleged in the complaint, Chicago operates an "emergency food program, a summer food program, rental assistance, transitional and overnight shelter programs, and case management services." (Complaint ¶ 88.) The City provides further programs for Chicago residents with disabilities, health care for low-income families, and for elderly residents. (*Id.* ¶¶ 89-91.) Assuming that the City makes no changes to these programs, the estimated effect of the change in federal law would be millions of dollars in extra expenditures. (*Id.*) Moreover, that burden is not limited to the City of Chicago. If the Court allows the Act's discriminatory provisions to stand, state and local governments throughout the Nation that provide safety net programs face the burden of increased spending under such programs. To limit spending on these programs to pre-Act levels, the governments would have to take separate legislative action cutting back on the programs,

and would have to do so in a manner that would not discriminate against noncitizens.

Second, independent of any increase in use of preexisting safety nets, State and local governments bear the brunt of this legislation because they will be confronted with the new immigrant poverty created by federal legislation. In many cases, States have acted to restore benefits that the federal government had removed. *See* Zimmerman at 22-23. But even States and localities that provide no new benefits must bear the costs of increasing unrelieved poverty, including homelessness, hunger, and state emergency health care costs.

Congress's imposition of this unfunded mandate was not accidental. In passing the Welfare Reform Act, Congress specifically intended to pass the burden of dealing with noncitizen poverty from the federal government to the States as a way to protect the federal fisc.[4] By maintaining welfare benefits for citizens who enjoy the franchise and vote in congressional elections while eliminating benefits for noncitizens (whose main difference from citizens for purposes of this case is that they do not vote in congressional elections), Congress managed to reduce the burden on the federal fisc and shift that burden to the States without absorbing any of the direct political cost of that decision.

Moreover, if the reasoning of the court below is not limited by this Court, the federal government could shift the responsibility to make a whole range of politically unpopular decisions to the States. The decision below held that the federal government was not prohibited by the due process

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[4] *See, e.g.*, 142 Cong. Rec. S9352, S9359 (daily ed. Aug. 1, 1996) (remarks of Sen. Exon), S9372 (remarks of Sen. Coats); 142 Cong. Rec. S9387, S9391-92 (daily ed. Aug. 1, 1996) (remarks of Sen. Grassley); 142 Cong. Rec. H9392, H9400 (daily ed. July 31, 1996) (remarks of Rep. Weldon); H.R. Conf. Rep. No. 104-725, at 262 (1996).

clause from discriminating against legal aliens in the provision of Social Security and health benefits. However, its reasoning cannot be limited to welfare benefits. If the decision below is correct, Congress could also require federal law enforcement agencies to commit all their resources to fighting crime against citizens and prohibit them from spending federal money to protect legal aliens, thereby requiring State and local governments to devote most of their scarce resources to protecting aliens. Likewise, nothing in the lower court's reasoning would prohibit the federal government from deciding, for example, not to enforce federal environmental protection or consumer protection statutes if legal aliens are victimized, leaving the entire burden of these expenses to the States. The States would be forced to shoulder the problems of both citizens and aliens, while the federal government could spend its resources on citizen-voters alone. But Congress's plenary power over immigration cannot be a plenary power to abdicate responsibility for policies dealing with noncitizens, and it cannot be a plenary power to push onto the States all the consequences of an immigration system over which they can have no control.

II. THE RULING BELOW IS NOT SUPPORTED BY THE DECISIONS OF THIS COURT

A. The Federal Government's Discrimination against Noncitizens Is Not Reviewed under the Rational Basis Standard

The court below ruled that federal legislation discriminating against noncitizens is subject only to rationality review, relying upon this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976). The court stated that *Diaz* "made clear that the standard of scrutiny applied to state legislation in

Richardson does not govern judicial review of federal legislation involving alienage."[5] This Court should grant certiorari to determine whether that reliance was misplaced.[6]

Mathews v. Diaz involved the limited question whether Congress could make a legal alien ineligible for participation in the federal medical insurance program, Medicare, during the first five years of that alien's residence in the United States. *Id.* at 69. Unlike the Welfare Act, the Medicare program was "financed in equal parts by the United States and by monthly premiums paid by individuals aged 65 or older who choose to enroll." *Id.* at 70 n.1. Moreover, the legislation did not effect a permanent ban; after five years of continuous residence, a permanent alien over 65 years old was eligible for participation in the plan. The Court upheld the legislation both because some "durational requirement" was "necessary to protect the fiscal integrity of the program" and to ensure that "transients" who had not paid premiums would not be eligible to receive benefits. *Id.* at 83-84.

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[5] Cert. Pet. App. 9a. The Seventh Circuit's mistaken reliance on *Diaz* has been shared by other courts. *See Rodriguez v. United States*, 169 F.3d 1342, 1350 (11th Cir. 1999); *Kiev v. Glickman*, 991 F. Supp. 1090, 1095-97 (D. Minn. 1998); *Abreu v. Callahan*, 971 F. Supp. 799, 807-811 (S.D.N.Y. 1997). *See also Cid v. South Dakota Dep't of Soc. Servs.*, 598 N.W.2d 887, 891-93 (S.D. 1999); *Moving Phones Partnership v. FCC*, 998 F.2d 1051, 1056 (D.C. Cir. 1993); *Sudomir v. McMahon*, 767 F.2d 1456, 1464-67 (9th Cir. 1985).

[6] The continuing validity of *Diaz* is in any case called into question by the intervening decision in *Adarand Constructors, Inc. v. Pena*, which clarified the precise relation between the restraint the Equal Protection Clause of the Fourteenth Amendment imposes on State governments and that the Due Process Clause puts on the federal government. 515 U.S. 200, 231-32 (1995) ("the Constitution imposes upon federal, state and local governmental actors the same obligation to respect the personal right to equal protection of the laws").

There is a substantial question whether *Diaz* held that all federal legislation affecting aliens is subject only to rationality review. The Court began its analysis by the strong statement that "[t]he Fifth Amendment, as well as the Fourteenth Amendment, protects every one of [the millions of aliens within the jurisdiction of the United States] from deprivation of life, liberty or property without due process of law." *Id.* at 77. After noting that the federal government has "power over naturalization and immigration" and that "[t]he exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry," the Court then stated that "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" *Id.* at 79-80 (citations omitted). The Court upheld the legislation because the appellees had not "identified a principled basis for prescribing a different standard than the one selected by Congress [but had], in effect, merely invited [the Court] to substitute [its] judgment for that of Congress in deciding which aliens shall be eligible to participate in the supplementary insurance program on the same conditions as citizens." *Id.* at 83-84.

"There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren*, 429 U.S. 190, 211-12 (1976); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) ("if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause"). *Diaz*

does not use the term "rationality review," nor does its inquiry take that form.[7] The opinion focuses *not* on the question of whether the line drawn was rational, but instead on whether the challenger had advanced "principled reasoning" that would both invalidate the line and suggest where it might more properly be drawn, because "some line is essential." *Id.* at 82-83. This analysis is very far indeed from rationality review.

That something more is required is rendered clear by *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), a case decided on the same day as *Diaz*. *Mow Sun Wong* involved a Civil Service Commission rule barring noncitizens from all federal civil service employment. While the federal government in *Mow Sun Wong*, like the court below, argued that the rule was justified by the goals of creating an incentive to naturalize and of saving funds, the Court refused to decide the case on this basis. *Id.* at 104. The Court stated that legal aliens are a "discrete and insular minority," who "are already

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[7] The statement in *Diaz* that the restrictions on noncitizens there were not "wholly irrational," 426 U.S. at 83 (quoted by the court below, App. at 9a), does *not* mean that the case employed rationality review, as a look at Justice Stevens's parallel articulation in his concurrence in *Craig v. Boren*, 429 U.S. 190 (1976), reveals. The concurrence begins its examination of the justifications of that case's law which burden young adult men by stating: "The classification is not totally irrational." *Id.* at 213. That statement does not indicate that rational basis is being used. Indeed, the concurrence immediately goes on to conclude that "[n]evertheless . . . the justification [is] unacceptable." *Id.* Examining a classification to see whether it lacks all rational basis is merely the first step in a more nuanced review which determines whether the justifications offered for a classification outweigh its invidiousness. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 514 (1989) (Stevens, J., concurring) ("instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation, I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment").

subject to disadvantages not shared by the remainder of the community," *id.* at 102 & n.22 (citation omitted), and that "[t]he concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment," *id.* at 100. The Court specifically rejected the idea that "the decision to limit employment of noncitizens in the federal competitive civil service is . . . beyond the reach of the equal protection principle." *Id.* at 99-101 & n.16.

While the Court stated that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State," *id.* at 100, the Court held that the Constitution required "judicial scrutiny" of that asserted justification. *Id.* at 103. First, "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Id.* Second, the Court must "evaluat[e] the sufficiency of the asserted justification for the rule." *Id.* at 105.

Finding that the rule exceeded the authority of the Civil Service Commission acting alone, the Court specifically reserved the question of whether a similar ban could be imposed by Congress. *Id.* at 116; *see also id.* at 117 (Brennan, concurring). If *Diaz* had settled the question by determining that congressional action disadvantaging noncitizens was valid if supported by any rational justification, then there would be nothing to reserve in *Mow Sun Wong,* since the justifications raised were not wholly irrational.[8]

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[8] Not only did the majority believe that Congress's power to deny civil service jobs to noncitizens was questionable, but two justices wrote separately to emphasize this point. 426 U.S. at 117. *Mow Sun Wong*'s

(continued...)

Mow Sun Wong thus makes it clear that the Court must engage in the same type of analysis when confronting a due process challenge to federal legislation as when confronting an equal protection challenge to state legislation. While the federal government may have different interests than those of an individual State, both federal and state interests are still subject to heightened scrutiny.

B. Congress's Immigration Power Should Be Limited to Matters Directly Relating to Naturalization and Immigration

DeCanas v. Bica, 424 U.S. 351 (1976), examined the limits of the immigration power and came to the reasoned conclusion that immigration regulation did not encompass every law that "has some purely speculative and indirect impact on immigration," but that the federal immigration power concerns "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. There is no reason to abandon that definition when looking at Congress's plenary power over immigration. "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973).

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[8] (...continued)
avoidance of the reserved question is not a simple accident of that opinion, but key to it. That case invalidates a Civil Service Commission rule as not "required" by Congress and the Executive even though the rule had been in place since the Civil Service Commission's inception in 1883, though members of Congress assumed that it would create such a rule, though both Congress and the President had repeatedly modified the rule over the years, and though the rule in question was authorized by an Executive Order granting the Commission the power to "establish standards with respect to citizenship" for civil service applicants. *Id.* at 106-12.

The programs at stake here are simply not related to admission into the country.[9] As Senator Alan K. Simpson has made clear, U.S. law since at least 1882 has prohibited the immigration of anyone who is "likely at any time to become a public charge."[10] When Congress can and does address immigration and naturalization directly through laws dedicated to those subjects, there is no need to extend such a broad power beyond the limits of such laws into legislation directed towards balancing the needs and burdens of the indigent in our society.

If *Diaz* is not so limited, there is no clear limit to Congress's discriminatory power over noncitizens. Almost anything which affects noncitizens, certainly anything which impacts them negatively, has an effect on incentives to immigrate and/or to naturalize. If Congress's arbitrary power is not tightly tethered to matters directly dealing with immigration or naturalization, it knows no natural bounds. Congress could not only deprive noncitizens of all public

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[9] Nor were these provisions really intended to aim at any immigration issue. Since immigration laws already weed out prospective immigrants likely to become reliant on public benefits, noncitizens who do end up on public assistance must have been unlikely to do so when they arrived in the country. But depriving noncitizens who unforeseeably fall into severe need of the aid they require can have no significant effect on the rational expectations of those considering emigration to this country. Nor will it affect naturalization except at the margins.

When Congress wants to affect immigration, it does so directly through immigration laws. It is there that the question of likelihood of becoming a public charge is best addressed; the unfortunate reality of those who fall into unexpected need is what public benefits laws are about, and to that unfortunate reality citizenship status should matter no more than the color of the needy person's skin.

[10] *The Use of Supplemental Security Income and Other Welfare Programs by Immigrants: Hearings Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 104th Cong. 1-2 (1997) (opening statement of Sen. Simpson quoting Immigration Act of 1882).

employment, it could deprive them of property rights or of abortion rights (or, perhaps more plausibly, could impose sterilization on indigent noncitizens).

The cases invalidating state discrimination against noncitizens rest on more than the principle that such discrimination is preempted by Congress. They rest on a belief that dislike of aliens based on their alienage is wrong. *See Mow Sun Wong*, 426 U.S. at 102; *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *In re Griffiths*, 413 U.S. at 721; *Graham*, 403 U.S. at 372. That is the basis for *Graham*'s assertion that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. 403 U.S. at 371-72. And that belief is just as palpable in *Mow Sun Wong*. *See* 426 U.S. at 107 (commenting on the unacceptableness of regarding "'foreigners' as a somewhat less desirable class of persons than American citizens," and noting the cases "requiring that aliens be treated with the dignity and respect accorded to other persons").

In legislation directly involving the conditions under which noncitizens can enter and reside in the country, Congress's distinctions may appropriately be virtually beyond review. But by limiting the scope of the immigration power, the field where what appears as offensive discrimination cannot be reviewed is also limited. Outside that limited scope, what looks like the most offensive discrimination, otherwise barred by the Constitution, should be treated as such.

A noncitizen who is denied benefits under this bill may otherwise be, in all relevant ways, identically situated to a citizen who receives them. They both may have worked identical hours and paid identical amounts into Social Security and taxes. What else can the decision to deny benefits to the foreigner, despite the work he has performed and the amount he has put into the system, be called other than invidious

discrimination? In both cases, Congress desires that the person become self-sufficient. If the fact of one's lack of citizenship status were sufficient to warrant such greater desire for self-sufficiency that the noncitizen could legitimately be denied benefits, then there is simply no possibility of separating irrational prejudice against foreigners from a well-regulated immigration system. And, indeed, the legislative history is replete with statements indicating that noncitizens are precisely less "desirable" and less deserving.[11] Legislation like this from the federal government fosters a climate of discrimination and intolerance throughout the country and thus requires greater scrutiny than the cursory review the lower courts have afforded federal laws that discriminate against noncitizens.

If, on the other hand, Congress's plenary power over immigration is clearly limited to immigration laws, then the attempt to disadvantage noncitizens legitimately admitted to the country stands revealed as the blatant prejudice that it is.

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[11] *See, e.g.*, 142 Cong. Rec. S9387, S9390 (daily ed. Aug. 1, 1996) (remarks of Sen. Helms); S9352, S9357 (remarks of Sen. Nickles); 142 Cong. Rec. H9392, H9401 (daily ed. July 31, 1996) (remarks of Rep. Smith); *Immigration and Public Welfare Benefits: Hearing Before the Senate Comm. on the Budget*, 104th Cong. 72 (1996) (remarks of Sen. Dominici); *The Use of Supplemental Security Income and Other Welfare Programs by Immigrants: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 104th Cong. 2-3 (1997) (remarks of Sen. Simpson). Congress routinely groups noncitizens with felons as groups abusing the welfare system. *See* 142 Cong. Rec. S9387, S9404 (daily ed. Aug. 1, 1996) (remarks of Sen. Thurmond); 142 Cong. Rec. H9392, H9400 (daily ed. July 31, 1996) (remarks of Rep. Weldon), H9421 (remarks of Rep. Goodlatte) ("By denying convicted felons and noncitizens taxpayer-funded assistance, we take away the scourge previously associated with all welfare benefits"); H.R. Conf. Rep. No. 104-725, at 262 (1996).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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